

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76-1018

B  
pgs

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH GAMBINO,

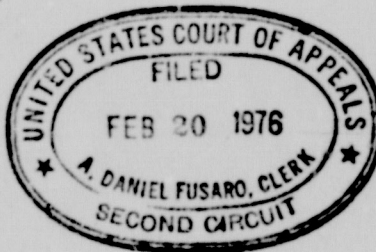
Defendant-Appellant.

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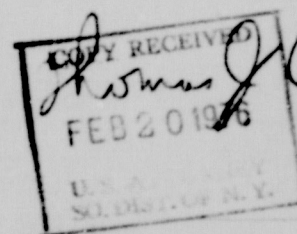
ON APPEAL FROM AN ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

---

APPELLANT'S APPENDIX



SAXE, BACON & BOLAN, P.C.  
Attorneys for Appellant  
39 East 68th Street  
New York, New York 10021  
(212) 472-1400



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CRIMINAL DOCKET  
UNITED STATES DISTRICT COURT

JUDGE TENNEY

64-3

D. C. Form No. 109 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Patrick T. Burke, Strike Force
JOSEPH GAMBINO	
	For Defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed ✓	Clerk	6/1/72	3/1/72	5-	5-
J.S. 3 mailed ✓	Marshal	6/1/72	3/1/72	5-	5-
XXXSUB Comp. #	Docket fee	2/27/72	3/1/72	5-	5-
Title 18	Fined \$250.00	4/4/72	3/1/72	5-	5-
Sec. 911					
False representation of citizenship.					
one count					

DATE	PROCEEDINGS
6-1-72	Filed Indictment.
6-12-72	No appearance- Adjd. to 6-19-72 Ryan, J.
6-19-72	Pleads not guilty. Deft ordered fingerprinted & photographed. Bail fixed at \$5,000 unsec PRB. Paroled until 4PM today to post bond. Motions ret in 10 days. WEINFELD, J.
6-19-72	SECOND CALL-Application to extend bail limits to include Eastern District of N.Y. granted. WEINFELD, J
6-19-72	Filed notice of appearance for Joseph Gambino ( Russo, stein, Caiola and Victor, 849 St Ann's 292-4860
6-19-72	Filed PRB on Joseph Gambino 5,000 unsecured, John Livingston CK.

OVER-

.2.

JUDGE TENNEY

## PROCEEDINGS

- 5-30-72 Filed notice of appearance by Russo, Stein, Gaidle Victor  
819 St. Ann's Ave. Bx. N.Y.
- 6-30-72 Filed Stipulation that ~~Joseph Gambino~~ <sup>James L. Rosa</sup> is sub. as atty. for the deft.  
in place of Paul A. Victor Tenney, J.
- 9-12-72 Filed afdvt. & notice of motion to dismiss the indictment, to suppress statements and  
for pre-trial hearing. Filed memorandum of law..
- 1-30-73 Jury trial begun before Tenney, J.
- 1-31-73 Trial continued.
- 2-1-73 Trial continued.
- 2-2-73 Trial continued and concluded. Jury verdict: Deft. Guilty. Pre-sentence  
investigation ordered. Sentence adjourned to 3-12-73.  
Bail continued. Tenney, J.
- 3-8-73 Gambino- Filed consent to change atty. substituting Saxe, Bacon Bolan,  
and Manley & James L. Rosa esq. So Ordered Tenney, J.
- 4-17-73 Filed Judgment 3.399 ) Atty. present, the deft is sentenced to ONE YEAR, execution  
of prison term is suspended, deft is placed on probation for a period of ONE YEAR,  
subject to the standing probation order of this Court, AND deft is FINED \$750., fine  
to be paid during period of probation at such times and in such amounts as the probatic  
department may direct, or the deft is to be committed until the fine is paid or he is  
otherwise discharged according to law... Bail pending appeal is cont'd on condition  
that the deft promptly prosecutes his appeal in accordance with the rules of this  
Court and the rules of the Court of Appeals for this Circuit.... Tenney, J.  
Entered 4-18-73-----
- 4-17-73 Filed defendants afdvt. and notice of motion for a new trial.
- 4-17-73 Filed memo endorsed on above motion: Defendants motion for a new trial on the ground  
of newly discovered evidence is denied after hearing counsel in open Court. So  
ordered. - Tenney, J. (w/n)
- 4-25-73 Filed notice of appeal to the 2nd Circuit from judgment filed  
4-17-73 (mailing copies to deft. and U.S. Atty.)
- 5-2-73 Filed Transcript of record of proceedings, dated 4-17-73.
- 6-14-73 Filed Transcript of record of proceedings, dated Jan 30, 30 - Feb 1, 2, 1973
- 6-14-73 Filed notice the record on appeal has this date been certified and transmitted to the  
U.S.C.A.
- 7-13-73 Joseph Gambino- Filed affidavit and notice of motion to allow deft to  
travel outside the district.
- 7-13-73 JOSEPH GAMBINO. Filed NOTICE IN OF MOTION TO ALLOW DEFENDANT TO  
TRAVEL OUTSIDE OF DISTRICT. Signed: SAXE, BACON, BOLAN, & MANLEY,  
attorneys for the defense.

(CONTINUED ON PAGE #2)



DATE	PROCEEDINGS
7-22-73	JOSEPH GAMBINO. Motion to allow defendant to travel outside district (filed on 7-13-73) is granted upon the following conditions: (1) defendant pay amount of fine prior to departure. (2) defendant file a personal affidavit stating his itinerary in detail. (3) defendant, or his counsel, notify U.S. Attorney upon his return to district. So ordered by CHARLES TENNEY, U.S.D.J.
10-24-73	Joseph Gambino-Filed true copy of C.A. mandate affirming the D.C. Judgment. Judgment entered 10-24-73, Clerk
10/24/74	J. Gambino - filed notice of motion re: vacate sentence ret: 11/1/74.
1/7/75	J. Gambino- Filed motion for summary judgment.
1/30/75	Filed Govt.'s affdvt. in opposition to motion to vacate conviction, etc.
1/30/75	Filed memo-end. on motion docketed 10/24/74, ...Accordingly, the motion is denied. Tenney, J. mailed notices.
02-27-75	Filed notice of appeal of deft. Joseph Gambino from order of 01-31-75. mailed copies.
03-19-75	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.
06-4-75	Filed true copy of order of the U.S.C.A. that the order of the District Court is affirmed. Clerk Judgment entered 6-11-75 Clerk mm
02-18-75	Filed deft. J. Gambino's notice of motion re: new trial.
02-18-75	Filed in support of motion for new trial.
10-06-75	Filed Govt.'s affdvt. re: response to motion for new trial (deft. J. Gambino)
12-16-75	Filed memo-end. on motion docketed the 16th of Sep. 1975. Deft. J. Gambino's motion for new trial...denied. Tenney, J. m/n
12-23-75	Filed deft. J. Gambino's notice of appeal from judgment of 12-16-75. mailed copies to U.S. Atty. & deft.
01-13-76	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.

BEST COPY AVAILABLE

UNITED STATES OF AMERICA :

- v - :

JOSEPH GAMBINO, ::

Defendant :  
-----X

INDICTMENT

72 Cr.

.4a

72 CRIM. 648

The Grand Jury charges:

On or about the 8th day of June, 1967 in the Southern District of New York, JOSEPH GAMBINO, the defendant, unlawfully, wilfully, knowingly and falsely represented himself to be a citizen of the United States, in that in the course of an official interview of said defendant conducted by Special Agent Edwin C. Taylor, Federal Bureau of Investigation, the defendant falsely stated that he had become a citizen of the United States in 1960, whereas in truth and in fact, as the defendant then and there well knew, he was not then and had never previously become a citizen of the United States.

(Title 13, United States Code, Section 911)

*James E. Sullivan*  
*Taylor*  
 6/1/72

*Alfred North Sander*  
 ALFRED NORTH SANDER, JR.  
 United States Attorney for the  
 Southern District of New York



12200-173

United States of America

v.

JOSEPH GAMBINO -

No.

72 Cr. 648

5a

5a

On this 17th day of April, 1973, came the attorney for the government and the defendant appeared in person, and by Roy Cohen, Esq.

It is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty by a jury

has been convicted of the offense of unlawfully, wilfully, knowingly and falsely represented himself to be a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, he was not then and had never previously become a citizen of the United States. (Title 18, U.S. Code, Section 911)

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is sentenced to (1) ONE YEAR, execution of prison sentence is suspended, defendant is placed on probation for a period of (1) ONE YEAR, subject to the standing probation order of the Court.

-and-

the defendant is FINED \$750., fine to be paid during period of probation such times and in such amounts as the probation department may direct, and the defendant is to be committed until the fine is paid or he is otherwise discharged according to law.

Bail pending appeal is continued on condition that the defendant promptly prosecute his appeal in accordance with the rules of this Court and the rules of the Court of Appeals for this Circuit.

It is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

RECORDED  
APR 18 1973

*Richard A. ...*  
United States District Judge  
*Thomas R. ...*

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA :

- against - :

72 Cr. 648  
(CHT)

JOSEPH GAMBINO, :

Defendant. :

: NOTICE OF MOTION  
-----X

S I R :

PLEASE TAKE NOTICE, that upon the annexed affidavits of Michael Rosen, Esq., Edythe Koerner, Paul Koerner, Patricia Conti, Carlo Conti and Joseph Gambino, the undersigned attorneys for the defendant, Joseph Gambino, will move this Court at a date, time and place to be set by the Court, for an order pursuant to Rule 33 of the Federal Rules of Criminal Procedure granting the defendant a new trial on the grounds of newly discovered evidence, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York  
September , 1975

Yours, etc.,

SAXE, BACON & BOLAN, P.C.  
Attorneys for Defendant  
39 East 68th Street  
New York, New York 10021  
(212) 472-1400

TO: PAUL J. CURRAN, ESQ.  
United States Attorney  
for the Southern District  
of New York  
1 St. Andrews Plaza  
New York, New York 10007



-----X  
UNITED STATES OF AMERICA :

-against- :

72 Cr. 648  
(GIF)

JOSEPH GAMBINO, :

Defendant. :

AFFIDAVIT

-----X  
STATE OF NEW YORK )  
COUNTY OF NEW YORK) SS:

MICHAEL ROSEN, being duly sworn, deposes and says:

I am a member of Saxe, Bacon & Bolan, P.C., attorneys for the defendant, and submit this affidavit in support of the instant application for a new trial.

The essential proof adduced by the government at trial was that Joseph Gambino had falsely stated his citizenship to an agent of the United States government and had consistently employed an alias to conceal his true identity.

The criteria for the granting of a new trial is well recognized, as demonstrated in the accompanying memorandum. In this regard, Mr. Conti's present affidavit becomes extremely critical. I am informed that the present affidavits are the product of further investigation and research undertaken by the defendant in an effort to present the truth to this Court.

Mr. Conti's affidavit goes directly to the heart of the government's case and if a new trial were granted and the testimony of Mr. Conti and the other affiants herein was presented to a jury, there would certainly be a probability of acquittal. Such evidence is not of a merely cumulative or impeaching nature, but bears directly on the question of the defendant's guilt or innocence. These affidavits do not, as is often the case, merely strike at a portion of the government's case, but rather, seriously challenge the essential facts upon which the conviction was based.

It is to be noted that our firm prepared Mr. Gambino's affidavit attached hereto. His affidavit, as well as the others attached hereto, were carefully read and explained to Mr. Gambino.

WHEREFORE, it is respectfully requested in the interests of justice that this application be granted in all respects.

  
MICHAEL ROSEN

Sworn to before me this  
11th day of September, 1975.



RONALD F. PEPPINO  
NOTARY PUBLIC - NEW YORK  
NASSAU COUNTY - #4603069  
COMMISSION EXPIRES -  
MARCH 30, 1977



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

JOSEPH GAMBINO,

Defendant.

72 Cr. 613

AFIDAVIT

STATE OF NEW YORK )  
 ) SS.:  
COUNTY OF NEW YORK )

EDYTHE KOERNER and PAUL KOERNER, being duly sworn,  
depose and say:

We live at 1318 Mace Avenue, Bronx, New York 10463.  
We have lived at that address from approximately 1962. Our build-  
ing is adjacent to 1320 Mace Avenue, a building which we believe  
is owned by Mrs. Ann Perry.

Approximately two years after we moved into our house  
we learned that the adjacent building at 1320 Mace Avenue was pur-  
chased by Ann Perry. Shortly thereafter we struck up a relation-  
ship and acquaintance with Mrs. Perry, her husband and daughters.  
Our friendship with Mrs. Perry continues until the present time.

Approximately early in 1964, Mrs. Perry told us that she  
had rented an apartment to a tenant, although she did not tell us  
at that time the name of the tenant. As the weather warmed,  
and as it is our custom, we would often congregate outside  
the house on the steps for social conversation. During that time  
a man came up to us and introduced himself as Joe Gambino,

**BEST COPY AVAILABLE**

the new tenant in Mrs. Perry's building next door.

10a

For the next several years while Mr. Gambino lived in Mrs. Perry's building, we and Mrs. Perry often sat in front of our houses and on innumerable occasions either Mrs. Perry, her late husband, or we referred to Mr. Gambino by his name, Joe Gambino. We heard Mrs. Perry time and time again use the actual words, "There goes Mr. Gambino," or "Hello, Joe," or "Hello, Mr. Gambino."

We have been told that Mrs. Perry had stated that she did not know that Joe Gambino's name was, in fact, Joe Gambino until a long time after he moved into the house. Based on our personal recollections and observances, we can state that that position is not in accordance with the truth. We know that Mrs. Perry knew Mr. Gambino to be Joe Gambino within one year after he moved in.

We recall specifically a July 4th gathering in front of our houses where Mr. Gambino was repeatedly referred to by Mrs. Perry as either Mr. Gambino or Joe. On several occasions Mr. Gambino was entrusted by Mr. and Mrs. Perry with taking a Perry daughter to school.

While Mr. Gambino was living in Mrs. Perry's house, he would entertain in his apartment his young godchild and the child's two brothers. Mrs. Perry complained that she did not like the coming and going of the young children and when Mr. Gambino continued to allow the children into the house, she said "I don't care how long it will take me, I'll get him back for that."

We have come to Mr. Cohn's office at this point upon the request of Mr. Gambino to advise Mr. Cohn's office as to what we personally know and remember as to the relationship between Mr. Gambino and Mrs. Perry.

*Paul J. Kerner*  
PAUL J. KERNER

*Paul J. Kerner*  
PAUL J. KERNER

Sworn to before me this

11th day of August, 1975

*Susan Bell*

SUSAN BELL  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 31-4507763 New York County  
Commission Expires March 30, '77



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

12a

UNITED STATES OF AMERICA

- against -

JOSEPH GAMBINO,

Defendant.

72 Cr. 648

AFFIDAVIT

STATE OF NEW YORK )

SS.:

COUNTY OF NEW YORK)

PATRICIA CONTI, being duly sworn, deposes and says:

I live at 2426 Seymour Avenue, Bronx, New York 10469.

My husband and I have known Joe Gambino for a long time, maybe around 13 years. I went with my husband to Mr. Cohn's office today when my husband was making the statement about the conversation with the agent. I know nothing about that because I was not there.

I heard Mr. Cohn and Mr. Gambino talking about the landlady, Mrs. Perry, who I knew as Ann, when I used to come over and see Joe. Mr. Cohn said that at the trial Ann said that she did not know Joe Gambino's name was Joe Gambino until a long time after Joe moved into the house on Mace Avenue. I remember very well that just after Joe moved into the house I went by to see Joe and his family. Ann was sitting on the steps and as I came up I said hello to her, and asked her if Joe Gambino was home. She told me that she had not seen him go out and thought he was inside. I know very well I asked for Joe Gambino and not any other name, and that she told me that Joe Gambino was inside.

After that I would ask her from time to time if Joe  
 Garbino was in when I came to visit and I remember that every time  
 I came she was always sitting outside the house and you would have  
 to go by her to get inside, and she would tell me whether Joe was  
 inside or not.

Sworn to before me this  
 6th day of August, 1976

*Patricia Conti*  
 PATRICIA CONTI  
 SUDAN DELL  
 HONORARY JUDGE, STATE OF NEW YORK  
 In 31, 1937/38 New York County  
 Commission Expires March 31, 1977

**BEST COPY AVAILABLE**

UNITED STATES OF AMERICA :

- against - :

JOSEPH GAMBINO, :

Defendant. :

AFFIDAVIT

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS.:

CARLO CONTI, being duly sworn, deposes and says:

I live at 2425 Sayona Avenue, Bronx, New York 10469.

I have known Joe Gambino for many years. In 1967 Joe and I were working together on a job for James Plastina Trucking Company, Columbus Avenue and East Place, Mount Vernon, New York. I remember very well that one day a man came over near the truck where Joe and I were working. He came over to me and asked where Mr. Gambino was. I said he was right under the truck and I called Joe. Joe came out from under the truck and talked to the man. I stayed standing next to Joe. I figured the man was a salesman or something. But when he asked Joe if he was Joseph Gambino and Joe said yes, the man showed an FBI badge. I listened while he was talking to Joe.

He asked Joe questions about his name and I remember he used the Italian Giuseppe at one point. He asked questions about the job and the work he was doing, and things like that. I am positive as I think back that he did not ask Joe anything about when or where he came into this country. I was there for the whole time and I heard no question from the agent and no answer from Joe which talked about in any way Joe's immigration status or when or where he came to the United States. I am very sure of this.



I was never asked about this or met Joe's lawyer at the trial and I was not even sure exactly what the trial was about. Sometime after the trial I asked Joe one day exactly what the whole thing was about. Joe explained to me about the agent saying at the trial that back in 1967 Joe had said he came to the United States through New York and things about his immigration status. I said to Joe, don't you remember I was working with you on the job that day. I was the one who called you from under the truck when the agent came the first time. I heard the conversation and there was nothing about you coming to the United States and where, and I was sure of this.

Joe asked me if I would make a statement to the office of Mr. Cohn, who is his lawyer now, and I told him I would because it was the truth. For sometime Joe has been asking when the lawyer could see me, and an appointment was made for today. I told Mr. Cohn what happened and he asked me if I would make this affidavit, which I am doing because it is true.

*Carlo Conti*

CARLO CONTI

Sworn to before me this  
6th day of August, 1975

*Susan Bell*

Notary Public

SUSAN BELL  
NOTARY PUBLIC, STATE OF NEW YORK  
In, Middlesex County, New York  
Commission Expires March 29, 1977

UNITED STATES OF AMERICA :

- against - :

72 Cr. 648  
(CHT)

JOSEPH GAMBINO, :

Defendant. :

AFFIDAVIT

-X

STATE OF NEW YORK )

) SS.:

COUNTY OF NEW YORK)

JOSEPH GAMBINO, being duly sworn, deposes and says:

I am the defendant in the above-entitled action and make this affidavit in support of the foregoing application for a new trial.

In 1972 I was indicted for violating 18 U.S.C. §91 in that I allegedly made a false claim that I was a United States citizen. Subsequently, I was tried and found guilty by a jury after trial before the Honorable Charles H. Tenney, and was sentenced to a one year suspended sentence and a fine of \$750.00.

I have always maintained my innocence, and submit that the affidavits submitted herewith clearly prove that this is the case. At the time of trial, the main issue was whether or not I had made false statements to an agent of the federal government. As seen by the affidavit of Carlo Conti, no such representations were made. Whether or not such statements were made was critical to the trial, and had this proof been available at trial, there is a significant possibility that I would not have been convicted.

Moreover, the affidavits of Patricia Conti, Edythe Koerner and Paul Koerner indicate that one of the main points of the government's case, that I intentionally concealed my identity, was absolutely false. Indeed, the testimony of Ann Perry was significant in this regard, and if the testimony of Mrs. Conti and



EDITOR'S NOTE

Pages 17A were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

the Koerners had been presented to the jury, I believe that there is a substantial possibility that a different verdict would have resulted.

I have read the foregoing affidavits of Patricia Conti, Carlo Conti, Edythe Koerner and Paul Koerner and adopt everything therein as true, to the best of my knowledge.

WHEREFORE, it is respectfully requested that this application be granted in all respects.

Sworn to before me this

JOSEPH GAMBINO

day of September, 1975

UNITED STATES OF AMERICA

19a

JOSEPH GAMBINO,

Defendant.

72 Cr. 648

(Judge Tenney)

AFFIDAVIT IN RESPONSE  
TO MOTION FOR NEW TRIAL

STATE OF NEW YORK:  
COUNTY OF NEW YORK:

MARK A. SPEISER, being duly sworn, deposes and says:

1. I am a Special Attorney with the United States Department of Justice and am assigned to the disposition of the above captioned matter.

2. Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, GAMBINO moves for a new trial based upon what he deceptively characterizes as newly discovered evidence. In support of his motion, the defendant submits for the Court's consideration three affidavits. The affidavit of Carlo Conti avers that he was present when the F.B.I. agent interviewed GAMBINO. Conti asserts that to the best of his recollection, the agent never questioned the defendant relative to his immigration status. Patricia Conti (Carlo Conti's wife) and Edythe and Paul Koerner attest in their affidavits that Ann Perry, a Government witness and the defendant's landlord, did, contrary to her testimony at trial, know the defendant by his name JOSEPH GAMBINO soon after he became a tenant in Perry's apartment.

3. The instant application is totally without merit. The Government vigorously opposes the defendant's spurious motion on two distinct grounds. First, by deceptively couching the motion in its present format counsel for GAMBINO attempts to mislead this Court into believing that it is now



weighing for the initial time the facts raised by the submitted affidavits. On the contrary, the issues so raised by this motion were considered and rejected by this Court when they were advanced by counsel's associate, Mr. Roy Cohn, on April 17, 1973 the date of GAMBINO'S sentencing. On that occasion, an affidavit of Carlo Conti (EXHIBIT "A") substantially identical to the one herein submitted was presented on GAMBINO'S behalf. Likewise on April 17, 1973, an affidavit of Frank Carofolo (EXHIBIT "B") was adduced on the defendant's behalf, raising the same contention relative to Ann Perry's knowledge of GAMBINO'S true name as is set forth in the affidavits of Patricia Conti and Edythe and Paul Koerner. After listening to oral argument, this Court denied GAMBINO'S motion for a new trial. (EXHIBITS "C" and "D").

GAMBINO appealed his conviction and one of his arguments was that this Court committed error in denying his motion for a new trial on the grounds of the newly discovered evidence heretofore discussed. The Second Circuit Court of Appeals affirmed without opinion on September 26, 1973 GAMBINO'S conviction. 483 F.2d 1399. The Supreme Court subsequently denied certiorari, 416 U.S. 932 (1974).

Counsel's glaring omission of any reference to these prior proceedings is intentionally misleading and inexcusable in view of their adverse consequence to the instant motion before this Court. Since the present claims have been passed upon by this Court in denying the previous motion for a new trial on identical grounds, by the Second Circuit Court of Appeals in affirming this Court, and by the Supreme Court in denying the writ of certiorari, they are without merit and now res judicata. United States v. Stephan 50 F. Supp. 445 (E.D. Mich. 1943); Saunders v. United States 192 F. 2d 409 (U.S. App. D.C. 1951).

4. Furthermore, it is respectfully submitted that GAMBINO's orders offer no plausible explanation as to why Patricia and Carlo Condi and Raythe and Paul Koenner, whose affidavits indicate they had known the defendant for over ten years, had not been produced at the trial. Brown v. United States, 333 F.2d 873 (2d Cir. 1964); United States v. Dunn, 338 F. Supp. 1252 (S.D.N.Y. 1972). Even assuming that the evidence which forms the basis of this motion, constitutes "newly discovered evidence," it is indeed evidence of such a nature that the failure to learn of its existence was caused solely by defendant's lack of diligence. United States v. Costello, 255 F. 2d 876, (2nd Cir. 1958), cert. denied, 357 U.S. 937 (1958); United States v. Stromberg 179 F. Supp. 278 (S.D.N.Y. 1959). The defendant had every opportunity at the trial to contradict the testimony of the F.B.I. agent and Ann Perry. In view of the abundance of evidence demonstrating at the trial that GAMBINO employed deliberate efforts to mislead the Immigration authorities, it is doubtful that the proffered testimony contained in the affidavits could have produced a different result had the affiants testified at the trial. United States v. Polisi, 416 F. 2d 573 (2d Cir. 1969).

5. WHEREFORE, it is requested that GAMBINO'S motion be denied.

Respectfully submitted

*Mark A. Speiser*

MARK A. SPEISER  
Special Attorney  
United States Department of  
Justice

Sworn to before me this

day of October, 1975



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-against- :

JOSEPH GAMBINO, :

Defendant. :

12 Cr. 648

AFFIDAVIT

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK)

CARLO CONTI, being duly sworn, deposes and says:

1. I have been acquainted with the defendant, JOSEPH GAMBINO, for twelve years, since we worked together as truck-drivers for James Plastina.

2. While I always spoke to Joe in English, it was extremely difficult to do so, as he found it necessary to grope for every word, and I always had to try to phrase sentences in the most elementary manner.

3. On June 8, 1967, while we were working, repairing a truck, a man came to speak to Joe. I was working only a few feet from the place where they spoke and heard the entire conversation. The man identified himself as FBI Agent Ed Taylor. He only stayed long enough to ask Joe for his name, his address and what his job was. Joe had difficulty understanding what the man was asking and it took several minutes for Agent Taylor to elicit even three simple responses.

4. Although I recently heard that Joe had been the defendant in a trial, it was not until several weeks after the

EXHIBIT "A"



completion of his trial that I told Joe that I had overheard the conversation.

5. During the many year I have been acquainted with Joseph Gambino, I have found him to be extremely honest and truthful and have never heard it said that he was otherwise.

*Carlo Conti*

Carlo Conti

Sworn to before me this

*16<sup>th</sup>* day of April, 1973.

*[Signature]*

Notary Public

MICHAEL ROSEN  
NOTARY PUBLIC, State of New York  
No. 413743703  
Comm. Exp. in Queens County  
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA.

-against-

JOSEPH GAMBINO,

Defendant. :

72 Cr. 643

AFFIDAVIT

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

FRANK GAROFALO, being duly sworn, deposes and says:

1. I have known the defendant, JOSEPH GAMBINO, for the past ten years, during which time we were neighbors on Mace Avenue in the Bronx.

2. For the past 20 years I have been employed by the New York State Department of Taxation and Finance. I am very active in community affairs, which activities include holding the following offices: Republican District Leader; Vice President of the New York State Columbian Association, and Trustee for the Sons of Italy. While in the 78th Division of the Army, I was decorated with the Combat Infantry Badge, the Purple Heart and the Good Conduct Medal.

3. Joe Gambino and I are well acquainted and Joe is the Godfather of my son. While we were neighbors, I always knew him as Joe Gambino, as did everyone else in the neighborhood. In fact, everyone called him Joe Gambino so as to distinguish him from the "Joe's" in the area.

EXHIBIT "B"



4. Joe has never been able to speak English with any fluency at all. His accent is very heavy and always made it difficult for me and others to understand what he was saying and, of course, it is extremely difficult for him to understand us. Usually, when we spoke, it would be in Italian, as speaking in English was almost impossible. Even today when I speak with Joe, most of our conversations are in Italian.

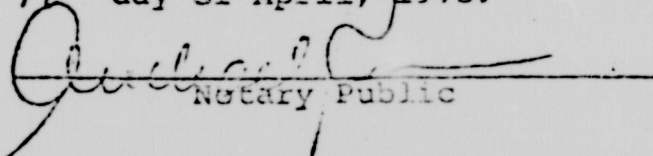
5. Anne Perry, Joe's landlady, often spoke with Joe and me on the front porch and she always referred to him as Joe Gambino. In fact, on several occasions during the fuel strike of 1967 and 1968, Joe delivered fuel to her and she told me how appreciative she was that Joe Gambino had helped her this way.

6. I have never heard Joe Gambino referred to by any other name than Joe Gambino and it was by that name that he was known to everyone in the community. Despite the fact that he could barely speak or understand English, he is a man greatly respected and trusted in the community, both for his honesty and sincerity.

  
Frank Garofolo

Sworn to before me this

1<sup>st</sup> day of April, 1973.

  
Notary Public

MICHAEL ROSEN  
NOTARY PUBLIC, State of New York  
No. 41,344,701  
Qualified in Queens County  
Commission Expires March 30, 1975

memch

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conceivable issue that might have stemmed from that, and insofar as that branch of this motion is concerned, I submit that it is utterly frivolous and should be denied out of hand.

I am prepared to respond to the other two, if your Honor wishes.

THE COURT: Yes.

MR. SHAW: So far as the other two are concerned, our position is precisely the same. Let me take the last one first.

Mr. Garafolo, it must have been obvious to the defendant as of the moment the indictment was filed that he was going to be raising the defense that he couldn't speak English. He called three or four witnesses to testify to that and they were fully cross-examined on that subject. Presumably he could have called a limitless number of people if they had been willing to say what he hoped they would say. Now, we have yet another person who purports to show that Joe Gambino simply doesn't speak English. That is hardly newly discovered evidence.

So far as Mr. Conte is concerned, again Mr. Conte now in an affidavit says that he was on the scene when Edwin Taylor interviewed this defendant. I think it is safe to assume that this defendant would have known that if that had



1  
2 been true. He had every opportunity to try to gather  
3 witnesses who could contradict anything that Mr. Taylor  
4 said. That also doesn't rise to the level of newly  
5 discovered evidence, and I respectfully request that the  
6 Court deny the motion in all respects at this time.

7 MR. COHN: Your Honor, with reference to that,  
8 all three of them, when this case came into the office  
9 and originally we weren't going to take it, we talked with  
10 Mr. Gambino, a couple of us did, and based on the nature  
11 of the -- the unusual nature of the charge and of the alleged  
12 false statements we went into it with some degree of  
13 thoroughness. We contacted Mr. LaRossa's office and then  
14 we decided to launch our own investigation, and come to the  
15 conclusion that there was evidence which was not presented  
16 to the jury, that in a case of this totally thin character,  
17 almost unprecedently thin character, that that evidence  
18 might have been extremely important.

19 Now, apparently Mr. Gambino had told Mr. LaRossa's  
20 office that somebody was present when he talked to Taylor  
21 but he wasn't sure who it was, it was one of a number of  
22 people. And they tried to locate somebody unsuccessfully.  
23 After the trial, when it was over, when Mr. Gambino saw  
24 Mr. Conte at an occasion with some other people and Mr.  
25 Conte asked him what the trial was and he told him, Mr.

1 manch

28a  
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2 Conte said he was the one who had been there when the  
3 FBI man came around. He didn't remember Taylor's name, said  
4 he remembered an FBI agent and I understand that was not  
5 available to Mr. LaRossa or the defendant prior to the trial.

6 And similarly, with reference to Mr. Garafolo,  
7 he is an official of the State of New York, he seems to be  
8 a highly intelligence person, and his testimony -- I don't  
9 know how these others they put on the stand came across,  
10 apparently not very well -- but I think Mr. Garafolo  
11 would have come across exceptionally well if his testimony  
12 had been available at the time because he is a man of  
13 seemingly unimpeachable integrity, as I say, an office  
14 holder, a position of some importance in the Department of  
15 Taxation and Finance of the State of New York for a number  
16 of years, and a man with very definite views as to the  
17 issues he sets forth in the affidavit.

18 We then went to the tape question, and apparently  
19 there there is no question but that a tape was played and  
20 there is also no question but that Mr. LaRossa either did  
21 not listen to the ones we listened to or that they weren't  
22 made available to him, and I am perfectly happy to take  
23 Mr. Shaw's statement as of the moment that they were made  
24 available to Mr. LaRossa and he just listened to what he  
25 wanted to listen to and not to the others, but under all of



1 bench

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2 the circumstances of a case like this, when there is  
3 available evidence which could have affected the jury's  
4 verdict, including a direct contradiction of -- a direct  
5 contradiction of the principal witness in support of the  
6 allegations of the indictment by somebody who was there and  
7 heard it, and is willing to submit to cross-examination, I  
8 would respectfully suggest that certainly at a minimum your  
9 Honor could hold a hearing, rather than determine insuff-  
10 ficiency merely on papers.

11 THE COURT: I can determine insufficiency just  
12 on this record. There is no evidence that there was anybody  
13 else present --

14 MR. COHN: We have some now.

15 THE COURT: -- until this man fortuitously appears  
16 after the jury's verdict. It certainly doesn't approach  
17 the requirements for a new trial and the motion will be  
18 denied.

19 Okay? That will give you additional basis for  
20 appeal.

21 MR. COHN: All right, your Honor.

22 Now, do you want to hear me on the question of  
23 sentence?

24 THE COURT: Yes.

25 MR. COHN: I think I can be very brief. I know

30a Index No. 72 Cr. 648 Year 19  
UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT  
OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOSEPH GAMBINO,

Defendant.

MOTION FOR A NEW TRIAL PURSU-  
ANT TO RULE 33

SAXE, BACON, BOLAN & MANLEY

Attorneys for Defendant

Office and Post Office Address, Telephone  
39 East 68th Street  
NEW YORK, N. Y. 10021  
(212) 472-1400

To

Attorney(s) for

Service of a copy of the within

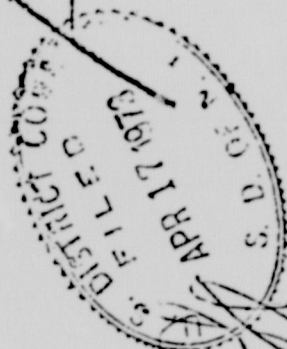
is hereby admitted.

Dated,

Attorney(s) for

4/18/73

Defendant's motion for a new trial on  
the ground of newly discovered evidence  
is denied after hearing counsel in open court.  
So ordered.



U.S.D.-D.

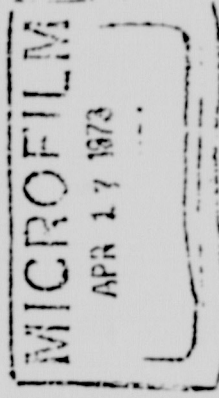


EXHIBIT "D"



Index No. 72 Cr. 648 (CHT) Car 19  
 UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

JOSEPH GAMBINO,

Defendant.

NOTICE OF MOTION

WILLIAM BACON, DOLAN & MANNEYS, P.C.  
 Attorneys for Defendant

Office and Post Office Address, Telephone

39 East 63rd Street

NEW YORK, N. Y. 10021

(212) 472-1400

To

Attorneys for

Service of a copy of the within

COPY FILED

Dated

SEP 16 1976

AND TO CLERK

U.S. DISTRICT OF N.Y.

ENDORSEMENT

DEFENDANT'S MOTION FOR A NEW TRIAL PURSUANT TO FED. R. CRIM. P. 33 IS DENIED SINCE THE CONTI [CARLO] AFFIDAVIT HAS BEEN PREVIOUSLY CONSIDERED ON A RULE 33 MOTION AND THE MOTION THEREAFTER DENIED; AND FURTHER, BECAUSE ALL OTHER AFFIDAVITS IN SUPPORT ARE MERELY CUMULATIVE AND NO PLAUSIBLE EXPLANATION HAS BEEN GIVEN WHY WAS NOT PRESENTED AT THE TRIAL.

So ORDERED.

*Charles H. Tandy*

U.S. D. J.

SEP 21 1976

DATED: NEW YORK, NEW YORK, SEPTEMBER 16, 1975.

DECEMBER 18, 1975.

UNITED STATES DISTRICT COURT

32a

Docket Number

NOTICE OF APPEAL

Notice is hereby given that \_\_\_\_\_ appeals to the United States Court of Appeals for the Second Circuit from the ☐ Judgment ☐ Order ☐ other (specify) \_\_\_\_\_ entered in this action on \_\_\_\_\_ (Date)

Date: \_\_\_\_\_  
To: United States Attorney  
Southern District of New York  
1 St. Andrew's Place  
New York, New York 10007

Address

(Counsel for Appellant) \_\_\_\_\_

20 East 68th Street  
New York, New York 10021  
(212) 472-1410

Phone Number

Clerk, United States District Court

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

- ☐ I am ordering a transcript.  
☐ I am not ordering a transcript  
Reason:  
☐ Daily copy is available  
☐ U.S. Attorney has placed order  
☐ Other. Attach explanation

TRANSCRIPT ORDER

- Prepare transcript of  
☐ Pre-trial proceedings  
☐ Trial  
☐ Sentence  
☐ Post-trial proceedings

DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE)

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ☐ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

DATE

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number of pages.

Date

Signature

(Court Reporter)

COPY FOR DEFENDANT